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No. 89-1641

In the Supreme Court of the United States

OCTOBER TERM, 1989

NEWS/SUN SENTINEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably found that the conduct of the union merger election satisfied minimum standards of due process and thus accurately reflected the employees' true desires.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	8
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Franks Bros. Co. v. *NLRB*, 321 U.S. 702 (1944)	5
Hammond Publishers, Inc., 286 N.L.R.B. No. 6 (Sept. 30, 1987)	5
Hydrotherm, Inc., 280 N.L.R.B. 1425 (1986)	7
J. H. Day Co., 204 N.L.R.B. 863 (1973)	8
J. Ray McDermott & Co. v. *NLRB*, 571 F.2d 850 (5th Cir.), cert. denied, 439 U.S. 839 (1978)	7
May Dep't Stores Co., 289 N.L.R.B. No. 88 (June 30, 1988)	5, 7
NLRB v. *Financial Institution Employees, Local No. 1182*, 475 U.S. 192 (1986)	5, 7
NLRB v. *Insulfab Plastics, Inc.*, 789 F.2d 961 (1st Cir. 1986), enforcing 274 N.L.R.B. 817 (1985)	7
Newspapers, Inc., 210 N.L.R.B. 8 (1974), enforced, 515 F.2d 334 (5th Cir. 1975)	4

Statutes:

National Labor Relations Act 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3
§ 8(a)(5), 29 U.S.C. 158(a)(5)	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 890 F.2d 430. The decision and order of the National Labor Relations Board (Pet. App. 10a-14a), including the decision of the administrative law judge (Pet. App. 15a-33a), is reported at 290 N.L.R.B. No. 156. The Board's order denying petitioner's motion for reconsideration (Pet. App. 39a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on November 17, 1989. A petition for rehearing was denied on January 16, 1990. App., *infra*, 1a.[1] The petition

[1] The order denying the petition for rehearing is not included in the petition appendix, but is reprinted in an appendix to this brief.

for a writ of certiorari was filed on April 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For some 30 years prior to 1985, petitioner had recognized the Fort Lauderdale Typographical Union Local No. 895 (Local 895) as the representative of its composing room employees. The most recent collective bargaining agreement between petitioner and Local 895 expired in June 1984. No agreement was reached on a new contract, and petitioner implemented its final offer in March 1985.[2] The parties met again in April without reaching agreement. In October, at Local 895's request, it was placed under trusteeship by its parent organization, the International Typographical Union (ITU).[3] The ITU then authorized a merger between Local 895 and Local 430, and a merger election was scheduled for December 11. Pet. App. 17a-18a.

The ITU sent mail ballots to members of Local 895, and the merger was discussed at membership meetings in November and early December. The mail ballots, which were returned in sealed envelopes and separately counted, yielded a tally of 74 in favor of the merger and 29 opposed. Pet. App. 18a, 27a.

In addition, the ITU-appointed trustee received permission from petitioner to conduct a merger vote in the composing room among nonunion members in the bargaining

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[2] Further references are to 1985 unless otherwise indicated.

[3] Local 895 sought the trusteeship because of "burn out" among its current officers and its inability to recruit new officers from within. The current officers felt that a trusteeship might lead to a resumption of negotiations with petitioner and would facilitate a merger between Local 895 and another ITU local, Miami Typographical Union No. 430 (Local 430), a step that the locals had been discussing for some time. Pet. App. 17a-18a.

unit, and a notice of the merger vote was posted in the composing room. Pet. App. 18a-19a. On the day of the election, nonunion members were given ballots and permitted to vote by placing a ballot in the opening of a padlocked ballot box. Local 895 Secretary-Treasurer Sakowski kept the padlocked box by his work station during the first work shift. It was left unattended in petitioner's maintenance room with a tape over the opening for three to four hours during the second shift. *Id.* at 19a, 23a. The eligibility list used by Local 895 for the composing room voting showed that 40 employees were given ballots in the composing room and that 36 of them had placed their ballots in the ballot box.[4] The tally of ballots for the composing room totaled 44 ballots, 41 for merger and 3 against. *Id.* at 22a. The total tally of the Local 895 vote was 115 for merger and 32 against. *Id.* at 19a.

On December 17, the trustee of Local 895 informed petitioner that the bargaining unit employees had voted 115 to 32 in favor of merging with Local 430 and that the merger would be effective on January 1, 1986. He requested a meeting to negotiate a new agreement. Pet. App. 19a, 29a. On January 27, 1986, petitioner responded that it understood that Local 895 "no longer exists and will no longer represent" its composing room employees, and that it did not believe that Local 430 "legally represents" those employees. It refused to recognize and bargain with Local 430 as their representative. *Id.* at 19a-20a.

2. The Board affirmed the findings and conclusions of the ALJ. The Board held that petitioner's refusal to bargain with the merged union violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), and it ordered petitioner to recognize and bargain with

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[4] Sakowski also gave ballots to union members who assured him that they had not received mail ballots, and he deposited his own mail ballot in the ballot box. C.A. App. 316, 319.

Local 430. Pet. App. 12a, 31a-33a. The Board applied its traditional two-pronged test to determine whether petitioner was obligated to recognize and bargain with the merged union—*i.e.*, whether the merger vote occurred under "circumstances satisfying minimum due process"[5] and whether there was substantial continuity between the pre- and post-merger union. The Board found that both conditions were satisfied here. *Id.* at 24a-31a.

Initially, the Board observed that petitioner bore the burden of proving an "irregularity in the voting process as it is [petitioner] that is relying on the irregularity as justification for its refusal to bargain." Pet. App. 26a, citing *Insulfab Plastics, Inc.*, 274 N.L.R.B. 817 (1985). The Board found that petitioner had failed to show that the procedures used in the vote "were so irregular or so unmindful of due process as to invalidate the election." Pet. App. 26a. Thus, the Board found no evidence of irregularities in the mail vote conducted among union members, which had produced an overwhelming vote in favor of the merger.[6] It also found that, with the possible exception of one nonmember who gave her ballot to union official Sakowski for deposit in the ballot box, there was no evidence that the composing room balloting was not secret. *Id.* at 27a.[7] The Board

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[5] This includes notice of the election to all voters, an opportunity for voters to discuss the election, and reasonable precautions to maintain ballot secrecy. See *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 (1974), enforced, 515 F.2d 334 (5th Cir. 1975).

[6] The Board found no evidence that any member did not receive his ballot or was otherwise deprived of his right to vote, or that the mail balloting, which had been separately tallied, "was tainted in any manner whatsoever." Pet. App. 27a. It added that, assuming that some members had deposited their mail ballots in the ballot box, or even that some members had voted in the composing room in addition to voting by mail, the election outcome would not have been affected. *Ibid.*

[7] The Board rejected petitioner's contention that evidence that the ballot box was unattended was sufficient proof of a lack of due

added that, even if all the composing room ballots were not counted, the result would be the same. *Ibid.* It also noted that there was no evidence of any employee challenge to the conduct of the election or dissatisfaction with the election process. *Id.* at 28a.[8]

Finally, the Board found that there was substantial continuity between the pre-merger Local 895 and the post-merger Local 430. The changes resulting from the merger, the Board concluded, were not "*sufficiently dramatic* to alter the union's identity." Pet. App. 11a n.1, citing *May Dep't Stores Co.*, 289 N.L.R.B. No. 88 (June 30, 1988), slip op. 14, and *NLRB* v. *Financial Institution Employees, Local No. 1182* (*Seattle-First*), 475 U.S. 192, 206 (1986).[9]

3. The court of appeals upheld the Board's findings and conclusions, and enforced its order. The court held that the Board was justified in finding on the record evidence that there was sufficient continuity between the pre- and post-merger union. Pet. App. 5a.[10] It also found that the

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process where, as here, there was no evidence the box had been tampered with. Pet. App. 28a, citing *Hammond Publishers, Inc.*, 286 N.L.R.B. No. 6 (Sept. 30, 1987).

[8] The Board found that an employee decertification petition, filed in February 1986, after petitioner had refused to bargain with Local 430, had no relevance to the merger. Pet. App. 28a, 40a n.2. Citing *Franks Bros.* v. *NLRB*, 321 U.S. 702, 704 (1944), the Board declined to permit the decertification petition filed after petitioner's unlawful refusal to bargain to serve as a "barometer of employee sentiment * * * [or] as a basis for an election." Pet. App. 40a n.2.

[9] The Board found that some of the officers of Local 895 became officers of the merged union, and that the authority of the chapel, consisting only of petitioner's composing room employees, remained substantially unaltered with respect to collective bargaining and contract administration. Pet. App. 11a n.1.

[10] Petitioner does not challenge that finding in this Court.

record did not support petitioner's contention that procedural irregularities in the election violated minimum standards of due process. *Ibid.*

The court agreed with the Board that an employer challenging a merger election must make an evidentiary showing of irregularity before the burden shifts to the General Counsel to make an affirmative showing of regularity, and that there was no evidence to suggest any taint in the mail balloting.[11] It found that "[a]bsent any evidence of irregularity," the mail vote "is a reliable indicator of majority sentiment." Pet. App. 5a-6a. The court also found that petitioner had presented insufficient evidence of irregularity to disturb the composing room results. It rejected petitioner's contention that the composing room procedures failed to insure that employees who voted in person did not also vote by mail, finding that the few discrepancies shown by the evidence were insufficient to undermine the vote in favor of merger. It agreed with the Board that requirements as to the custody of the ballot box in Board-conducted elections do not apply to a union merger election, and found that the composing room procedures "were not so lacking in safeguards as to cast substantial doubt on the election outcome." *Id.* at 6a.

ARGUMENT

The court of appeals' decision is correct, and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

This Court held in *Seattle-First* that the Board had exceeded its authority by imposing, atop its traditional

[11] The court observed that, while the mail balloting did not conform to the Board's standards for its own elections, those standards do not govern union conducted elections. Pet. App. 6a.

minimum due process requirements, the requirement that nonmembers be allowed to participate in an affiliation or merger vote. 475 U.S. at 201-209.[12] Although the Court noted that "the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations," the Court nonetheless concluded that it "need not assess the propriety of the Board's past [due process] procedures." *Id.* at 199 n.6. This case also provides no occasion for the Court to consider that question, since petitioner does not contest the propriety of the Board's due process requirements. Instead, petitioner only contends, Pet. i, 7, that the Board erred in finding that those requirements were satisfied in this case. That essentially fact-bound issue does not warrant review by this Court.

In any event, the court below correctly upheld the Board's findings that the election was fairly conducted. In concluding that the merger vote procedures did not fall below its standards, the Board considered the record evidence in light of its long-standing rules that an employer who challenges a merger vote must make an affirmative showing of material irregularity and that union reorganization votes need not conform to the standards adhered to in Board conducted elections.[13] The Board found, and the court of appeals agreed, that there was no evidence that the mail balloting by union members was tainted, and under this Court's decision in *Seattle-First*, Local 430 was not required to give nonmembers an opportunity to vote on the merger.

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[12] Although Seattle-First involved an independent local union's affiliation with an international organization, the same standards apply to other union organizational restructuring, such as merger. *Hydrotherm, Inc.*, 280 N.L.R.B. 1425, 1428 (1986). See also *May Dep't Stores Co.*, 289 N.L.R.B. No. 88 (June 30, 1988), slip op. 2 n.4.

[13] Both of these rules have been approved by the courts. See, *e.g.*, *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 965-968 (1st Cir. 1986), enforcing 274 N.L.R.B. 817, 821-823 (1985); *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850, 856 n.4 (5th Cir.), cert. denied, 439 U.S. 839 (1978).

In any event, the Board found, and the court of appeals agreed, that any duplicative voting in the composing room had been minimal, and that the ballot box discrepancy was insignificant. Those findings do not warrant further review.[14]

CONCLUSION

The petition for a writ of a certiorari should be denied.
Respectfully submitted.

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[14] The Board's decision in each case turns on an examination of all the circumstances. Petitioner is mistaken in its contention, Pet. 6-7, that the decision here is inconsistent with Board precedents. In *J. H. Day Co.*, 204 N.L.R.B. 863 (1973), 56 out of 134 ballots were defective and the proposed affiliation had passed by only 17 votes. By contrast, here the outcome would be the same if none of the composing room votes were counted.

* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1815

NEWS/SUN SENTINEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
MIAMI TYPOGRAPHICAL UNION, NO. 430, INTERVENOR

[Filed Jan. 16, 1990]

BEFORE: Wald, Chief Judge; Ruth B. Ginsburg and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Petitioner's Petition for Rehearing, filed December 26, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
DEPUTY CLERK

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